FEB 1 3 195
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 533.

WALTER H. FOSTER, ET AL., *Petitioners,*

v.

GENERAL MOTORS CORPORATION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONERS' REPLY BRIEF.

Respondent asserts that no new reasons are advanced here for granting the writ which were not rejected by denial of the writ in *Dougherty* v. *General Motors Corp.*, 338 U. S. 956. (Br. 9, 10) But that case posed only one of the issues here, the escalator principle versus the leave of absence theory.

On this issue decisions since the *Dougherty* case, of which the petition cites *Gregory, Brown* and *Oakley* (after re-

mand) (Pet. 16-18), have sharpened the conflict among the lower courts, and have raised the leave of absence theory to a position of prominence if not dominance. The changed military posture of the country, caused by hostilities in Korea and threats of aggression elsewhere, has vastly increased the importance of the correct interpretation of this statute, both now and for the future. This increased importance has found effect in the establishment by employers generally of policies covering such matters as vacation pay for those absent in military service (Pet. 20-21), and in Congressional action in 1951 amending the Act (Pet. 8, n. 2; 16).

The discrimination question and its corollary, the summary judgment issue, were not presented by Dougherty, as his petition shows. Though Dougherty argued in the court of appeals that the 1946 agreement was discriminatory, it is clear from both the opinion and his brief that he contended the "discrimination" lay in barring him from the escalator. While the escalator principle may properly be rephrased in terms of preventing discrimination, the discrimination of which petitioners complain is more pointedly direct and vicious: it results from giving to the non-veteran in the form of additional vacation pay or to the employer in the form of savings what was taken from the veterans, rather than simply preventing veterans from keeping pace with their fellows. Respondent defends this result by asserting that the veteran absent three years is no worse off than the non-veteran absent two weeks for vacation or illness because both had no earnings during the absence, and that to reach a different result would "discriminate in favor of veterans." (Br. 10-11). The veteran because of military service loses 52/52 of his vacation, and the non-veteran loses only 2/52. Any "equality" between them is unrealistic and merely formal. Whether such formal equality satisfies the Act when the practical application, the concrete effects, the distribution of losses, guarantee the veteran (and scarcely anyone else) a far

worse position in fact and substance is the question here. No such question arose in the *Dougherty* case.

Respondent is mistaken in assuming (Br. 10) petitioners have abandoned their contention below that the 1946 provision was a device of hostility toward veterans. As they say in their petition (p. 10), they believe respondent knew the effects of the 1946 provision, both when it proposed the novel "percentage of earnings" computation and when it assented to calendar year earnings as a base, and that this knowledge, express or implied, amounts to a purpose that veterans should be injured as they were. Though Dougherty did not mention these circumstances, the possibility of their existence disturbed the court of appeals sufficiently for it to mention them (176 F. 2d at 563) and to limit its decision cautiously to the case where "the intent and operation do not place veterans in a position inferior to that of non-veterans on leave of absence." 176 F. 2d at 564. Respondent's admission below that it knew it was "particularly veterans" (R. 58) who were adversely affected by the peculiar 1946 method of figuring vacation pay amply shows intent, if intent is essential to discrimination. The court below attached no importance to the crucial fact that the "percentage of earnings" clause was peculiar to 1946, the only year it could have wrought so much damage to so many returning veterans (see Petition, 5, 10); indeed, the opinion erroneously stated that it was used in all other years. (R. 110) Together, these circumstances make it clear the decision below is that discrimination is permitted if done through collective bargaining; on no other ground can it be sustained. Disposition of the case by summary judgment confirms this rationale. The problem in no way appeared in the *Dougherty* case. Its importance is obvious. Since this case presents it clearly, this Court should resolve it.

Respectfully submitted,

WEAVER & GLASSIE
THOMAS M. COOLEY, II